

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
HELENA DIVISION

FILED
FEB 16 2017
Clerk, U.S. District Court
District Of Montana
Missoula

KRISTIN KANE KELLER,

Petitioner,

vs.

LEROY KIRKEGARD,

Respondent.

CV 16-111-H-DLC-JTJ

ORDER

United States Magistrate Judge John Johnston entered his Findings and Recommendations in this matter on December 16, 2016, recommending dismissal of Petitioner Kristin Kane Keller's ("Keller") application for writ of habeas corpus under 28 U.S.C. § 2254. On December 28, 2016, Keller moved for an extension to file objections to the Findings and Recommendations stating that he just received the document from prison staff. (Doc. 3.) The Court granted Keller's request and allowed him until January 27, 2017, to file his objections. (Doc. 4.) However, instead of filing objections, on February 10, 2017, Keller filed a notice of appeal stating that he is appealing Judge Johnston's Findings and Recommendations. (Doc. 5.)

"As a general rule, the filing of a notice of appeal divests a district court of

jurisdiction over those aspects of the case involved in the appeal.” *Stein v. Wood*, 127 F.3d 1187, 1189 (9th Cir.1997). However, there is an exception to the general rule when the appeal is patently frivolous. *Marks v. Clarke*, 102 F.3d 1012, 1018 n. 8 (9th Cir. 1996) (citation omitted). Here, since Keller has not appealed from an appealable final order, the appeal is frivolous. *See* 28 U.S.C. § 1291. As a result, this Court reviews the Findings and Recommendations for clear error. *See McDonnell Douglas Corp. v. Commodore Bus. Mach., Inc.*, 656 F.2d 1309, 1313 (9th Cir. 1981); *Thomas v. Arn*, 474 U.S. 140, 149 (1985). Clear error exists if the Court is left with a “definite and firm conviction that a mistake has been committed.” *United States v. Syrax*, 235 F.3d 422, 427 (9th Cir. 2000) (citations omitted).

Having reviewed the Findings and Recommendations, the Court finds no clear error in Judge Johnston’s conclusion that Keller’s petition is second or successive in nature and, thus, the Court lacks jurisdiction to hear his claims. Keller’s present petition attempts to challenge his 2014 convictions. However, this Court has already dismissed two petitions by Keller which attempted to challenge those convictions. *See Keller v. Frink*, No. CV-15-159-H-DLC-JTJ (D. Mont. Jan. 26, 2016); *Keller v. Kirkegard*, No. CV-16-14-H-DLC (D. Mont. Apr. 22, 2016). Accordingly, this Court will likewise dismiss Keller’s petition as

second or successive in nature. Keller must seek leave from the United States Court of Appeals for the Ninth Circuit to file his petition. *See* 28 U.S.C. § 2244(b)(3).

There being no clear error in Judge Johnston's Findings and Recommendations, IT IS ORDERED that:

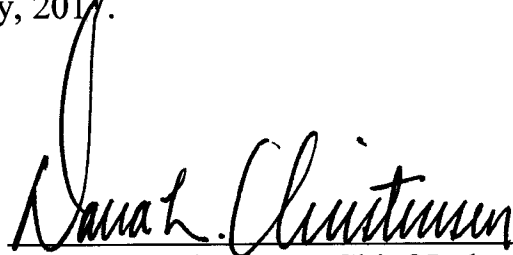
(1) Judge Johnston's Findings and Recommendations (Doc. 2) are ADOPTED IN FULL.

(2) Keller's Petition (Doc. 1) is DISMISSED for lack of jurisdiction.

(3) The Clerk of Court is directed to enter, by separate document, a judgment of dismissal.

(4) A certificate of appealability is DENIED.

Dated this 16th day of February, 2017.

A handwritten signature in black ink, reading "Dana L. Christensen". The signature is written in a cursive style with a large, looping initial "D".

Dana L. Christensen, Chief Judge
United States District Court